SHOW PROCEEDINGS AND ORDERS DATE: [04/28/89]

CASE NBR: [88106497] CFX STATUS: [ ]
SHORT TITLE: [Wrenn, Curtis L.]
VERSUS [Dept. of Mental Health] DATE DOCKETED: [020289]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Feb 2 1989		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Feb 2 1989		Motion of petitioner for leave to proceed in forma pauperis filed.
Mar 9 1989		DISTRIBUTED. March 24, 1989
Mar 27 1989		Motion of petitioner for leave to proceed in forma pauperis DENIED. Petitioner is allowed until April 17, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. Justice Brennan, Justice Marshall and Justice Stevens, dissenting: For the reasons expressed in Brown v. Herald Co., Inc., 464 U.S. 928 (1983), we would deny the petition for a writ of certiorari without reaching the merits of the motion to proceed in forma pauperis.

Last page of docket

SHOW PROCEEDINGS AND ORDERS DATE: [04/28/89]

CASE NBR: [88106497] CFX STATUS: [ ]
SHORT TITLE: [Wrenn, Curtis L.]
VERSUS [Dept. of Mental Health] DATE DOCKETED: [020289]
PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 1 1989		Application (A88-796) for an extension of time within which to submit a petition for a writ of certiorari in compliance with Rule 33, submitted to Justice Scalia.
Apr 12 1989		Application (A88-796) denied by Justice Scalia.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

88-6497

(2)

CURTIS L. WRENN
P. O. Box 1691
Albany, NY 12201.

Plaintiff-Petitioner.

VS

DONALD E. WIDMANN, M.D., INDIVIDUALLY AND OFFICIAL CAPACITY, DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO
30 Broad Street
Columbus, OH

Defendants-Respondents.

RECEIVED
FEB 2 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Curtis L. Wrenn, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has not previously been granted leave to proceed in forma pauperis before the U.S. Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

Curtis L. Wrenn

AFFIDAVIT

I, Curtis L. Wrenn, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor I state that because of my poverty I am unable to

/continued

88-6497

pay the costs of said proceeding or to give security therefor. that I believe I am entitled to redress: and that the issues which I desire to present on appeal are the following:

(1) The decision of the United States District Court that my charge before the EEOC had been conciliated, was clearly erroneous in that it was not supported by the facts. Moreover, the District Court's refusal to acknowledge that I had made a prima facie claim of retaliation, was a clear abuse of the court's discretion.

(2) The Court of Appeals' decision that my retaliation claim was barred by the three-year statute of limitations, was clearly erroneous and a clear abuse of discretion.

(3) The Court of Appeals' decision was racially motivated, in that despite having been presented with facts and legal theory to demonstrate that the District Court's decision was erroneous, the appellate court upheld the decision.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this petition in this Court are true:

(1) Are you presently employed? Yes. U.S. Army, Wilcox Medical Clinic, Fort Drum, NY; gross annual salary

/continued

$27,716.00, as of November 7, 1988.

(2) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

(3) Do you own any cash or checking or savings account? Yes. Total value $40.00.

(4) Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? Family home which has a market value of approximately $72,000.00, and savings bond of $250.00.

(5) Other income (Military U.S. Army pension 1987: $14,496.00.)

(6) List the persons who are dependent upon you for support and state your relationship to those persons: Connie M. Wrenn (wife); Penny D. Wrenn (daughter); Chris Peterson (step-son); and Amy Peterson (step-daughter).

(7) State any special financial circumstances which the Court should consider in this application. I am a highly trained administrator in hospital and health care administration, but despite my qualifications I have not been able to obtain a job in my profession in any of the more than 7,000 hospitals since July 1, 1978. My special

/continued

dire financial circumstances, including personal debts in excess of $60,000.00 (excluding home mortgage) and the continuing denial of equal employment opportunity by private and public employers, has been caused by more than ten years of trying to combat a growing nationwide campaign to deprive me of rights, privileges and immunities secured by the Constitution and laws of the United States. As a result of administrative and legal actions against those who have discriminated against me, I have exhausted all my savings and investments.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Curtis L. Wrenn

SUBSCRIBED AND SWORN TO before me this _____ day of November, 1988.

Curtis L. Wrenn

NOTARY

MARY LOU DANCY
Notary Public, State of New York
Qualified in [illegible] Co. No. [illegible]
My Commission Expires January [illegible], 19___.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO _____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603

Petitioner,

vs

DONALD E. WIDMANN, M.D., INDIVIDUALLY AND OFFICIAL CAPACITY, DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO
30 East Broad Street
Columbus, OH

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE SIXTH CIRCUIT

CURTIS L. WRENN, Pro Se
P. O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-4021

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO _____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603

Petitioner,

vs

DONALD E. WIDMANN, M.D., INDIVIDUALLY
AND OFFICIAL CAPACITY, DEPARTMENT OF
MENTAL HEALTH, STATE OF OHIO
30 East Broad Street
Columbus, OH

Respondents.

The petitioner, Curtis L. Wrenn, respectfully prays that a writ of certiorari will be issued to review the Order of the United States Court of Appeals for the Sixth Circuit November 4, 1988.

QUESTIONS PRESENTED FOR REVIEW

This is a case in which the respondents obtained dismissal of plaintiff's claims at the pre- trial level, because the District Court alleged that this case presented the same issues as C81-571. If this Court grants the Petition, it will have to decide whether the rights of the petitioner were abridged by the lower courts' decisions. More specifically:

1. Whether the Court of Appeals abused its discretion and erred as a matter of law when it ruled that "The plaintiff's claim of conspiracy ... was not cognizable given its vague, conclusory nature. ... The plaintiff's pendent state claim for libel likewise was meritless in that it was clearly barred by the one year statute of limitation for libel actions ..."

2. Whether the District Court's dismissal of the petitioner's retaliation claim under Title VII, allegedly because ANOTHER unrelated retaliation claim in C 81-571 was dismissed, was a clear abuse of discretion and was clearly erroneous.

3. Whether the district court erred as a matter of law and clearly abused its discretion when it held that the employer articulated a legitimate reason for its continuing retaliation, when in fact the employer offered NO explanation for its action.

TABLE OF CONTENTS

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT I:

> Congress shall make no law ...abriding the freedom of speech ...; or the right of the people peaceably ... to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION: AMENDMENT V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION, AMENDMENT XIV:

> Nor deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254(1), 1651 and 1915. This court is being asked to review the decisions of the Court of Appeals for the Sixth Circuit to dismiss the petitioner's appeal without apparently considering the merits of the appeal.

The jurisdiction of this Court is also invoked to review the actions of the lower courts, in that they have made a decision which invalidates a mandate of Congress, i.e., Title VII of the Civil Rights Act of 1964, as amended.

TABLE OF AUTHORITIES

OPINIONS BELOW

1. This is an action in which the petitioner (Curtis L. Wrenn, a Negroid American whose date of birth is February 14, 1930) sued the State of Ohio (Donald E Widmann, Commissioner, Mental Health of ODMH (hereinafter "Widmann") and other State officials for their continuing concerted acts of retaliation to deprive petitioner of equal employment opportunity in his chosen profession of hospital and health care administration.

2. The petitioner encountered his first discriminatory denial of employment when he was denied the position of Assistant Superintendent of Programs. Following that refusal to employ, he filed a charge of discrimination with the EEOC. The EEOC issued a determination of probable cause, and following unsuccessful attempts to conciliate the charge, the Department of Justice issued the petitioner his Notice of Right to Sue. See EEOC Charge 052791758.

3. During the latter part of 1979, the petitioner, in response to the employer's advertisement, submitted his application for the position of Superintendent of TMHC and was hired effective December 16, 1979. Sometime around November 15, 1980 Ms Barbara Morgan, EEO officer of ODMH, met with the petitioner to discuss charge 052791758. During the meeting, Ms Morgan, apparently on behalf of ODMH, asked

the petitioner to withdraw his charge. The petitioner declined to do so.

4. On December 16, 1980 the petitioner was summoned to Widmann's office and informed him that he was being removed from the position of Superintendent of TMHC. Widmann refused to provide any explanation for the removal. He did, however, in response to petitioner's request, inform the petitioner that the reason for his removal was "a lack of confidence in you and your administration of the Toledo Mental Health Center."

5. In January 1981 the petitioner filed a second charge with the EEOC (052811127) in connection with the discharge, and alleged, among other things, that the discharge was motivated by race and retaliaiton.

6. The EEOC rendered a determination of reasonable cause in connection with 052811127. The State of Ohio declined to conciliate, and as a result the Justice Department issued petitioner his Notice of Right to Sue.

7. A complaint was filed in the District Court on the basis of unlawful failure to hire and retaliatory discharge (C81-571). A trial was held and the United States District Court found for the employer. See, Exhibit H.

8. The petitioner appealed the district court's decision to the Sixth Circuit Court of Appeals. The Court of Appeals upheld the district court.

9. While C 81-571 was still pending, the petitioner filed this action allegeing a conspiracy to deprive him of rights, privileges and immunities secured by the Constitution and laws of the United States, including but not limited to Title VII.

10. This petition for writ of certiorari is in response to the decision of the United States District Court, on the basis that that court's "findings of fact" are clearly erroneous, and that its decision was based on an improper legal premise in the course of the proceedings.

11. This case is similar to AND is directly related to a case currently before this Court. In the latter (Wrenn v. Walinski, Case No. 88-6131), the petitioner also alleges that the District Court fabricated and/or created facts to support its decision. As will be demonstrated in this case the facts were NOT as articulated by Judge Walinski in his "findings of facts."

12. This case involves a clear abuse of discretion by the District Court (Exhibits C,D,E,F and G) and a misapprehension of the facts and applicable law (Exhibit M).

REASONS FOR GRANTING WRIT

I. GENERAL

1. This case centers around clearly erroneous findings of facts and an erroneous interpretation of the law. The latter has do with the lower courts misinterpretation of this Court's decisions, i.e., McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981).

2. This case also concerns whether the district court erred in finding that the "defendants articulated a legitimate nondiscriminatory reason for plaintiff's termination. Widmann .. lacked trust and confidence ... Plaintiff served at the will of the appointing authority." Thus the question before this Court is whether "at will" public employment, especially as in this case when it contravenes public policy, is allowed or permitted?

3. Petitioner submits that a review of the records in this case will clearly demonstrate that the lower courts misapprehended the facts and misapplied the law to the facts. As such this case falls within the teaching of Pullman Standard v. Swint, 456 U.S. 273, 287-90, 102 S.Ct. 1781, 1789-91, 72 L.Ed.2d 66 (1982), in that the courts committed an error of law in failing to consider relevant

II. CONSPIRACY CLAIM

1. The Court of Appeal's dismissal of petitioner's conspiracy claim alleged because of its "vague,conclusory nature" was clearly erroneous, considering the facts in the case (Exhibit M).

2. The evidence at Exhibit M clearly demonstrate concerted action by employees and agents of the State of Ohio to deprive petitioner of rights, privileges and immunities secured by the Constitution and laws of the United States, including but not limited to the right to oppose employment practices made unlawful by the Constitution and laws of the United States. The facts at Exhibit M clearly demonstrate the State of Ohio has targeted the petitioner as a proponent of racial justice. The latter standing alone warrants consideration under the federal civil rights conspiracy statute providing a cause of action to persons deprived of rights or privileges.

3. A legion of cases from this Court and the other courts of appeals would contradict the decision of the Sixth Circuit by holding that a cause of action would be stated if a citizen was "deprived of any rights, privileges or immunities secured by the Constitution and Laws." In this case the petitioner, as a result of the concerted action by officials of the State of Ohio, has been deprived of the opportunity to become gainfully employed in his chosen

profession of hospital and health care administration in the States of Alabama, Georgia, New York and Ohio, all because he has "opposed" unlawful employment practices and "participated" in Title VII administrative and legal proceedings. See, e.g., Lewis v. Brauligan, (CA Fla 1975) 227, F.2d 124, 55 A.L.R. 2d 205; Gillespie v. Civiletti, (CA Wash 1980) 629 F.2d 637; Flagg Brothers Inc. v. Brooks, 436 US 149, 56 L.Ed.2d 185,189, 98 S.Ct. 1729.

III. LIBEL CLAIM

1. The dismissal of petitioner's libel claim is not supported by the facts in the case (Exhibit M). The facts demonstrate that this case was filed in 1983 and that the libelous action has continued from at least 1982 to at least 1985.

2. As a result of the concerted action by the State of Ohio, petitioner's good name has been called into question, he has been stigmatized and defamed to such an extent that he has been unable to practice his profession.

3. The decision of the Sixth Circuit is contrary to this Court and the other appellate courts. See, e.g., Moore v. Otero, 557 F.2d 435, 437 (5th Cir 1977); Stretten v. Wodsworth Veterans Hospital, 537 F.2d 361, 365-66 (9th Cir 1976); Paul v. Davis 424 U.S. at 710-712, 96 S Ct at 1164-

1165; Board of Regents v. Roth, 408 US at 573, 92 S. Ct. at 2707.

4. This Court is being asked to resolve the apparent dispute among the circuits.

IV. RETALIATION CLAIM

1. It is undisputed in this case that the petitioner had previously "opposed" unlawful employment practice and had "participated" in Title VII proceedings, by among other things filing a charge with the EEOC against the State of Ohio in 1979, and filing Civil Action 81-571 in 1981. This action was filed in 1983.

2. Contrary to the lower courts the retaliaiton claim in this case (83-493) is not the same as in 81-571. The latter involves an allegation of retaliatory discharge as a reult of the petitioner's being fired after he refused to withdraw a charge he had filed against the State of Ohio with the EEOC. This case, on the other hand, involves continuing acts of retaliation based upon the State of Ohio refusal to rehire the petitioner and providing adverse employment references to other prospective employers (Exhibit M) to prevent his employment. The lower courts conveniently ignored the fact that the adverse employment references were provided years before the decision in 81-571 (Exhibit H).

3. The decision of the Sixth Circuit is contrary to those of the other appellate courts and this Court. See, e.g., Eichman v. Indiana State University Board of Trustees, 597 F.2d 1104 (7th Cir 1979); McDonnell Douglas v. Green, 411 U.S. 792, 802 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

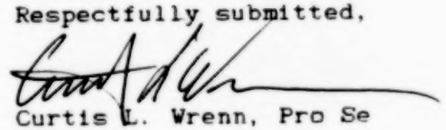
4. This Court is asked to resolve the apparent dispute among the circuits, especially regarding the issue of "whether a complainant needs to establish the validity of his original claim to prove a charge of employer retaliation flowing from the original claim." See, e.g., Burdine; Parker v. Baltimore & O.R. Co., 1981, 652 F.2d 1012, 209 U.S. App. D.C. 215, on remand 555 F. Supp. 1182; Payne v. McLemore's Wholesale & Retail Stores, (CA LA 1981) 654 F.2d 1130, rehearing denied 660 F.2d 497, certiorari denied 102 S.Ct. 1630.

CONCLUSION

The lower courts' decisions to deny petitioner's claims were clearly erroneous, in that the decisions were not supported by the facts in the case nor by applicable laws promulgated by Congress and/or as interpreted by this Court.

Accordingly, the decisions must be reversed and remanded to the District Court.

Respectfully submitted,



Curtis L. Wrenn, Pro Se

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to the Attorney General, State of Ohio, Columbus, OH on February 1, 1988 via certified mail, return receipt requested, number P831016458.

Curtis L. Wrenn

LIST OF PETITIONER'S EXHIBITS/APPENDICES

No. 87-3437

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
FEB 4 1988
JOHN P. HEHMAN, Clerk

CURTIS L. WRENN,

Plaintiff-Appellant,

v.

DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO; DONALD E. WIDMANN, M.D., INDIVIDUALLY AND OFFICIAL CAPACITY; TIMOTHY B. MORITZ, M.D., INDIVIDUALLY AND OFFICIAL CAPACITY; MYERS R. KURTZ, INDIVIDUALLY AND OFFICIAL CAPACITY,

Defendants-Appellees.

O R D E R

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: ENGEL, KENNEDY, and KRUPANSKY, Circuit Judges.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The plaintiff, a black male, appeals the judgment in the defendants' favor in this Title VII action. That judgment dismissed the plaintiff's employment discrimination action based on the factual findings of the district court in an earlier Title VII action filed by the plaintiff. In that earlier action, the district court found that the defendants discharged the plaintiff from his position as superintendent of the Toledo Mental Health

Center for a legitimate, nondiscriminatory reason. The district court further found that the plaintiff had failed to prove that the defendants' stated reason was a pretext for discrimination. Because the defendants in this action relied on the same reason for their refusal to rehire the plaintiff, the district court applied the doctrine of collateral estoppel to hold that the plaintiff's claims were foreclosed by its earlier findings.

On appeal, the plaintiff argues that the doctrine of collateral estoppel does not apply because the earlier Title VII action is dissimilar from the present action in its facts and issues. We disagree with this position. The district court properly applied the doctrine of collateral estoppel under the four criteria this court recently discussed in Detroit Police Officers Association v. Young, 824 F.2d 512, 515 (6th Cir. 1987). No additional issues were raised by the plaintiff which would have prevented the district court from dismissing his action. The plaintiff's claim of conspiracy under 42 U.S.C. § 1985(3) was not cognizable given its vague, conclusory nature. Smith v. Rose, 760 F.2d 102 (6th Cir. 1985). The plaintiff's pendent state claim for libel likewise was meritless in that it was clearly barred by the one year statute of limitation for libel actions imposed under Ohio Rev. Code § 2305.11. Guccione v. Hustler Magazine, 64 Ohio Misc. 59, 413 N.E.2d 860, 861 (Cty. Com. Pl. 1978).

Accordingly, the judgment of the district court is affirmed pursuant to Rule 9(b)(5), Rules of the Sixth Circuit.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By _____
Deputy Clerk

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

ISSUED AS MANDATE: November 22, 1988
COSTS: None

No. 87-3437

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 4 1988
LEONARD GREEN, Clerk

CURTIS WRENN,

Plaintiff-Appellant,

v.

DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO; DONALD E. WIDMANN, M.D., INDIVIDUALLY AND OFFICIAL CAPACITY; TIMOTHY B. MORITZ, M.D., INDIVIDUALLY AND OFFICIAL CAPACITY; MYERS R. KURTZ, INDIVIDUALLY AND OFFICIAL CAPACITY,

O R D E R

BEFORE: ENGEL, KENNEDY and KRUPANSKY; Circuit Judges.

This matter is before the court on appellant's petition for rehearing. Upon consideration, it is ORDERED the petition is denied.

ENTERED BY ORDER OF THE COURT

Clerk

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CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT
TOLEDO, OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis L. Wrenn,

Plaintiff(s),

vs.

State of Ohio, etc., et. al.

Defendant(s).

Case No. C 83-493

ORDER

Upon consideration, the individual defendants are not found to be in default, therefore,

Plaintiff's request for entry of default is hereby denied.

IT IS SO ORDERED.

Nicholas J. Walinski
UNITED STATES DISTRICT JUDGE

Toledo, Ohio

APPENDIX D

FILED
1985 FEB 22 AM 11:55
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT
TOLEDO, OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS L. WRENN,

Plaintiff,

-vs-

DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO, et al.,

Defendant.

No. C 83-493

MEMORANDUM and ORDER

* * * *

WALINSKI, J.

This cause came to be heard on motions made by defendants to dismiss, and/or for summary judgment, and to consolidate. Also before the Court are plaintiff's motions in limine, for reconsideration, and for preliminary injunction. This case is brought pursuant to 42 U.S.C. §§1983 and 1985(3) as well as 29 U.S.C. §621 et seq. Jurisdiction is predicated on 28 U.S.C. §§1343 and 1331.

The facts indicate that plaintiff was employed as Superintendent of the Toledo Mental Health Center (hereinafter "TMHC") from December 17, 1979 through December 16, 1980. Plaintiff claims he was summarily dismissed from his position after a year of service by Donald E. Widmann, M.D., Commissioner, Division of Mental Health. According to plaintiff, his dismissal was wrongfully based on his age and race in violation of 42 U.S.C. §§1983 and 1985(3) and 29 U.S.C. §621 et seq. Further claims are made by plaintiff stemming from allegedly defamatory statements made by Dr. Widmann and

EXHIBIT G
1 OF

published in the Toledo Blade and Toledo Journal regarding plaintiff's termination. Finally, plaintiff claims he was wrongfully refused consideration when he subsequently applied for the position of Superintendent of TMHC and other Ohio Department of Mental Health (hereinafter "ODMH") facilities during 1981. Each party has made a number of motions which the Court will address individually.

Defendants' Motion to Dismiss the §1983 Claim

The defendants move to dismiss the claims brought pursuant to 42 U.S.C. §1983 based on the Eleventh Amendment bar to such actions. A threshold determination as to this Court's power to hear these claims is thus mandated.

The Eleventh Amendment to the United States Constitution provides, in part:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State . . .

The immunity conferred has been construed to bar suits against a state by its own citizens as well as citizens of other states. E.g., Edelman v. Jordan, 415 U.S. 651 (1974). The immunity also extends to bar suits against state agencies which are an arm or alter ego of the state. See Alabama v. Pugh, 438 U.S. 781 (1978). Although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see Fitzpatrick v. Bitker, 427 U.S. 445 (1976), an unequivocal expression of congressional intent is required to "overturn the constitutionally guaranteed

immunity of the several States." Quern v. Jordon, 440 U.S. 332 (1979). Section 1983 does not explicitly and by clear language indicate an intent to sweep away immunity. Thus, such a suit in federal court brought by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Id. at 337.

This immunity, however, is not without limitation. In Edelman, the Supreme Court pointed out that under the landmark decision in Ex parte Young, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such action may have some effect on the state treasury. 415 U.S. at 667-668; Quern v. Jordan, 440 U.S. 332, 337 (1979). "The distinction between that relief permissible under the doctrine of Ex parte Young and that found barred in Edelman was the difference between prospective relief on one hand and retrospective relief on the other." Id.

Thus, this Court lacks jurisdiction over the Ohio Department of Mental Health with respect to the §1983 claims for retrospective relief. The complaint requests injunctive, declaratory and monetary relief. Included in the prayer for monetary damages are demands for back pay, pain and suffering, economic loss, punitive damages, attorney's fees and costs. Included in the request for injunctive relief are demands for reinstatement in the position of Superintendent of TMHC and an injunction against future acts of discrimination. In

accordance with the interpretation of the Eleventh Amendment by Edelman, reinstatement, prospective injunctive and declaratory relief are permitted. Costs are also permitted despite the Eleventh Amendment. Hutto v. Finney, 437 U.S. 678 (1978). Back pay, pain and suffering, economic loss, and punitive damages, however, contemplate a payment for past conduct and are thus retroactive awards of monetary relief. Edelman makes clear that such relief may not be sought in federal courts to the extent that the payments will be made out of the state treasury.

Plaintiff also brings the §1983 action against defendants Widmann, Moritz, and Kurtz in their official and individual capacities. It has been frequently recognized that officials sued in their official capacities do not pay awards of damages out of their personal assets. See Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1945). Moreover, although the §1983 claim is brought against defendants in their individual capacities, the factual averments of conduct on the part of the individual defendants would not subject them to liability other than that which would be paid by the state pursuant to O.R.C. §9.87. Thus, recovery against Moritz, Widmann and Kurtz is barred to the same extent as the recovery against ODMH. The motion to dismiss the §1983 claims for retrospective relief against all defendants is well taken and same is granted.

AO 72A (Rev. 8/82)

Rel of Adv

Defendants' Motion to Dismiss the §1985(3) Claim

Defendants also move to dismiss the §1985(3) claims. The Court notes that the principals of immunity developed under §1983 have been applied to actions brought under §1985(3). See e.g., Chai v. Michigan Technological University, 493 F.Supp. 1137, 1164 (W.D. Mich. 1980); Bosely v. City of Euclid, 496 F.2d 193 (6th Cir. 1974). Accordingly, and for the reasons set forth in the Court's discussion of the §1983 claims, the motion to dismiss the §1985(3) claims for restrospective relief is granted as to all defendants.

Defendants' Motion to Dismiss for Want of Personal Jurisdiction

Defendants move the Court to dismiss the entire action as to defendants Widmann, Moritz, and Kurtz based on plaintiff's failure to perfect proper service of process. Although defendant supports the motion with a lengthy memorandum filed July 14, 1983, the issues raised therein have since become moot. Defendants admit that service of process may be made at the business address of an individual pursuant to Ohio Civ. R. 4.1. However, the crux of defendants improper service argument is that the individual defendants were no longer employed at ODMH when the service was directed there. The record before the Court indicates that defendants have subsequently been properly served via certified mail at their respective current business addresses. Ohio Civ. R. 4.1. Such service was made on each defendant as of July 15, 1983, well within 120 days of the June 9, 1983 filing date of the

complaint in accordance with Fed. R. Civ. P. 4(j). Thus, defendants' motion to dismiss for want of personal jurisdiction is denied.

Defendants' Motion to Dismiss the Claims Under the Age Discrimination in Employment Act

Defendants claim that plaintiff's cause of action filed pursuant to the Age Discrimination in Employment Act (hereinafter "ADEA") is barred by the statute of limitations. The events from which this employment discrimination case arises occurred on December 16, 1980 (his discharge from position of Superintendent of TMHC) and April 13, 1981 (denial of employment in other capacities). This lawsuit was commenced on June 9, 1983. The statute of limitations applicable to an ADEA action is two years unless the violations are willful. If willful violations are involved there is a three year statute of limitations. 29 U.S.C. §255. See Kazanzas v. Walt Disney World Co., 704 F.2d 1527 (11th Cir. 1983).

Defendants admit that plaintiff makes allegations of willful or intentional violations of ADEA at ¶¶21 and 22 of the complaint. However, defendants submit that these are boiler plate allegations which are not supported by the facts. Rule 8(a) Fed. R. Civ. P. requires only that the complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief. Plaintiff clearly makes an attempt to plead willful violations of the ADEA in the paragraphs of the complaint referred to by defendants. In light of the minimal requirement of Fed. R. Civ. P. 8(a), plaintiff's obvious attempt to comply, and the Court's

obligation to liberally construe the allegations in a pro se complaint, the Court must deny defendants' motion to dismiss the ADEA claims.

Plaintiff's Motion for Reconsideration of Denial of Default Judgment

On August 16, 1983, plaintiff moved for default judgment against defendants Widmann, Moritz, and Kurtz for failure to plead or otherwise defend the action. This Court denied the request for entry of default in its order of August 22, 1983. Currently pending before the Court is plaintiff's motion for reconsideration of the denial of default judgment. Plaintiff additionally requests that the Court advise him of the basis of its decision that defendants were not found to be in default.

In denying the motion for default judgment, [the Court relied in part on defendants' representation that they were under the impression that they had filed responsive pleadings in this action.] Defendants' responsive pleading was a motion to dismiss based in part on failure to obtain proper service. Before the Court ruled on the motion to dismiss, plaintiff perfected service. [The confused procedural posture in which this and many other Curtis Wrenn cases remain is due to the multiplicity and duplicity of motions and claims filed by plaintiff.] In light of the above, the motion for reconsideration of denial of default judgment is denied.

Plaintiff's Motion in Limine

Plaintiff moves the Court to prohibit defendants from offering evidence that ODMH is a state agency operating

not-for-profit facilities. Plaintiff also wishes to exclude evidence that he has filed numerous lawsuits in other courts and numerous complaints with the EEOC alleging discrimination. As is the practice of this Court, the motion will be taken under advisement and ruled on at an appropriate time closer to the time of trial.

Plaintiff's Motion for Preliminary Injunction

Plaintiff has made two motions for injunctive relief. First, plaintiff requests the Court to restore him to his former status as Superintendent of TMHC. Second, plaintiff moves the Court to enjoin defendant Widmann and other present and former officials of the State of Ohio from providing future adverse employment references.

The Sixth Circuit recently reiterated in Friendship Materials v. Michigan Brick, Inc., 679 F.2d 100 (6th Cir. 1982) the factors to be considered by a district court in exercising its discretion to grant a preliminary injunction.

> 1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
> 2) Whether the plaintiffs have shown irreparable injury;
> 3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
> 4) Whether the public interest would be served by issuing a preliminary injunction.

679 F.2d at 102. See also Mason County Medical Association v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977); Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1087 (6th Cir. 1975); Garlock, Inc. v. United Seal, Inc., 404 F.2d 256, 257 (6th Cir. 1968).

Plaintiff has failed to establish that his motions for preliminary injunction should be granted based on the four standards set forth above. The conclusory language contained in plaintiffs second motion merely parrots the standards without any supporting facts on which the Court might base a ruling. The first motion provides even less basis for a favorable ruling since it contains no references to these standards whatsoever. Accordingly, the Court denies plaintiff's motions for preliminary injunction.

Defendants' Motion to Consolidate

Defendants move the Court to consolidate plaintiff's remaining claims with Wrenn v. Benson, C 81-571 and Wrenn v. State of Ohio, C 82-205. On December 13, 1983, Wrenn v. State of Ohio, C 82-205 was consolidated with case No. C 81-665 on the docket of the Honorable John W. Potter. Although this action does not preclude the further consolidation requested by defendant, the Court will decline to rule on the motion at this juncture. Plaintiff has filed multiple claims which remain on this Court's docket. Many of these cases are scheduled for pretrial on March 25, 1985. The motions for consolidation are an appropriate subject for consideration at such pretrial. It will be the purpose of the pretrial to entertain any motions for consolidation which will reduce the number of duplicative rulings and orders which this Court has been required to make in the course of plaintiff's protracted litigation of his claims.

It is therefore,

ORDERED that defendants' motion to dismiss the claim filed pursuant to 42 U.S.C §1983 for restrospective relief is granted as to all defendants.

FURTHER ORDERED that defendants' motion to dismiss the claim filed pursuant to 42 U.S.C §1985(3) for retrospective relief is granted as to all defendants.

FURTHER ORDERED that defendants' motion to dismiss for want of personal jurisdiction is denied.

FURTHER ORDERED that defendants' motion to dismiss the claim filed pursuant to 29 U.S.C §621 et seq. is denied.

FURTHER ORDERED that plaintiff's motion for reconsideration of denial of default judgment is denied.

FURTHER ORDERED that plaintiff's motion in limine is taken under advisement until an appropriate time closer to the time of trial.

FURTHER ORDERED that plaintiff's motions for preliminary injunction are denied.

FURTHER ORDERED that defendants' motion to consolidate are taken under advisement until the time of pretrial.

FURTHER ORDERED that this matter is set for PRETRIAL MONDAY, MARCH 25, 1985 at 9:45 A.M.

Michael J. Walinski
UNITED STATES DISTRICT JUDGE

Toledo, Ohio
February 14, 1985

AO 72A (Rev. 8/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS L. WRENN,

Plaintiff,

vs.

LAWRENCE P. BENSON, etc., et al.,

Defendant.

Case No. C 81-571

JUDGMENT

* * * *

WALINSKI, J.

This cause is before the Court following trial of November 10, 1986 through November 21, 1986. At the close of plaintiff's case, the Court granted defendants' motion for directed verdict in part, dismissing plaintiff's original claim for damages as to non-hire. Final memoranda were filed December 8, 1986. The matter is therefore decisional. The Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is a civil rights action in which the plaintiff, Curtis L. Wrenn, a black male, seeks damages for a claim of discriminatory failure to hire and claims of discriminatory and retaliatory discharge from employment.

2. Defendants are the Toledo Mental Health Center ("TMHC"), an institution of the Ohio Department of Mental Health, and Donald E. Widmann, M.D. ("Widmann."), who served as Commissioner of the Division of Mental Health and Forensic

APPENDIX H

1 OF 9

Psychiatry of the Ohio Department of Mental Health from 1979 to 1981. The remaining originally named defendants were dismissed prior to trial.

3. Beginning in approximately August, 1978, TMHC advertised an opening for the position of Assistant Superintendent of Programs. (Plaintiff's Ex. A & B; Defendants' Ex. 1-6). Although earlier placed advertisements continued to run through January, 1979, TMHC announced at the end of December, 1978 that the Assistant Superintendent of Programs position was filled, effective January 22, 1979. (Plaintiff's Ex. L; Defendants' Ex. 9). TMHC personnel reviewed hundreds of applications and conducted telephone interviews, convention interviews, and office interviews before extending any offers. Plaintiff did not apply for the Assistant Superintendent of Programs position until December 26, 1978. Plaintiff had not been in the pool of prospective applicants whose resumes were considered and he was notified by letter dated January 30, 1979 that he had not been hired. (Plaintiff's Ex. C). Plaintiff's race was not asked by nor stated to defendants in connection with plaintiff's application for Assistant Superintendent of Programs.

4. As a result of not being hired as Assistant Superintendent of Programs, plaintiff filed charge number 052791758 in February, 1979 with the Ohio Civil Rights Commission ("OCRC") and Equal Employment Opportunity Commission ("EEOC") against TMHC for race-based employment discrimination.

2

(Plaintiff's Ex. U). Plaintiff presumed his race was known to defendants from submission of his five-page resume.

5. In August or September, 1979, plaintiff applied at TMHC and was interviewed for the position of Superintendent. (Defendant's Ex. 15-17). Based on a screening committee's review and recommendation, plaintiff was appointed on November 29, 1979 as Superintendent of TMHC, effective December 17, 1979. (Plaintiff's Ex. P; Defendants' Ex. 18 and 20).

6. At the time plaintiff was hired as Superintendent, at least one member of the search committee and TMHC's personnel director were aware of plaintiff's charge of discrimination for the earlier failure to hire as Assistant Superintendent of Programs. (Defendants' Ex. 13). After plaintiff's acceptance of the Superintendent position, charge number 0527J1758 was treated as a conciliation and dismissed.

7. As Superintendent of TMHC, plaintiff was an unclassified civil servant, serving at the pleasure of an appointing authority. (Defendants' Ex. 46). At the direction of Dr. Timothy Moritz, Director of the Ohio Department of Mental Health at that time, Widmann appointed and supervised Superintendents, including plaintiff. Such an appointment required continued trust and confidence in plaintiff's judgment and abilities by Widmann, as the appointing authority.

8. Plaintiff served as Superintendent for about one year. Plaintiff worked during that time to achieve cost

containment as to overtime pay and staffing and to maintain accreditation.

9. On December 16, 1980, Widmann, after discussions with Dr. Moritz, notified plaintiff that he was terminated. The basis for termination was Widmann's loss of trust and confidence in plaintiff's ability to carry out his duties as Superintendent. (Joint Ex. VIII at 5). Widmann lost confidence in plaintiff after reports from and discussions with plaintiff's immediate supervisors, Paul Guggenheim[1] and Roger Murray.[2] After personal observations and feedback from community mental health care professionals, Guggenheim raised concerns and criticisms about plaintiff's performance. Guggenheim found plaintiff to be egotistical, aggressive, confrontational, and hostile both to established policies and chain of command procedures. Murray also spoke to plaintiff on several occasions about specific incidents where plaintiff's behavior was abrasive, inappropriate and an embarrassment. At two different meetings in 1980, plaintiff threatened immediate discharge into the community of 150-200 patients, though the community lacked resources for sufficient aftercare. Murray found that plaintiff attempted oversimplified solutions to complex problems. Based upon plaintiff's performance and several complaints from community agency representatives concerning plaintiff's conduct and patient neglect, Murray

[1] Guggenheim was plaintiff's immediate supervisor from December, 1979 through June, 1980.

[2] Murray was plaintiff's immediate supervisor from June, 1980 until plaintiff's termination.

recommended to Widmann that plaintiff be terminated. Widmann gave plaintiff the option of resigning or face termination, and plaintiff chose termination. (Joint Ex. VIII at 1).

10. Plaintiff requested a written statement of reasons for his termination, an informal meeting with the appointing authority, and administrative review of the termination decision. (Plaintiff's Ex. Q; Joint Ex. VIII at 3). TMHC and Widmann provided plaintiff with a written statement of the reason for removal. (Joint Ex. VIII at 9). On January 12, 1981, at an informal meeting between plaintiff and Widmann, Widmann reconsidered his decision and confirmed plaintiff's termination. (Id. at 11). Thereafter, plaintiff requested review by Widmann's supervisor. (Id. at 12-13). Myers Kurtz, new Director of the Ohio Department of Mental Health, reviewed plaintiff's claims and, determining that Dr. Widmann did not act with malfeasance, upheld plaintiff's removal as Superintendent of TMHC. (Id. at 17-18).

11. After plaintiff's discharge, the Superintendent's position was filled by Chris Roberts, a white male.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and §1343(3) and (4).

2. It is an unlawful employment practice under Title VII to discriminate on the basis of race. 42 U.S.C. §2000e-2(a). Establishing a Title VII violation under the theory of disparate treatment (an employer treating some people

less favorably than others because of race), requires a showing by plaintiff that he has been the victim of intentional discrimination. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983); Daniels v. Board of Education, 805 F.2d 203, 205 (6th Cir. 1986). The requisite evidentiary test is three-fold.

Initially, the plaintiff in a Title VII action bears the burden of establishing a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejections, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. Different factual situations such as discharge or retaliation vary the specifications of proof for a prima facie case.

Once a plaintiff has established a prima facie case, the burden of going forward with evidence shifts to defendant "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. Burdine, 450 U.S. at 253. The defendant's evidence must merely raise a genuine issue of fact as to whether defendant discriminated. Id. at 254-55.

Next, plaintiff must prove that the reason given by defendant was a mere pretext for discrimination. Id. at 256.

pretext is shown "either directly by persuading the court that a discriminatory reason more likely motivated the [defendant] or indirectly by showing that the [defendant's] proffered explanation is unworthy of credence." Id.

3. Plaintiff also brings his action under 42 U.S.C. §1983, on grounds that the alleged discriminatory employment practices involve state action. "[T]he order and allocation of proof, applicable in a disparate treatment case under Title VII, may be utilized in adjudicating race discrimination claims arising under sections 1981 and 1983." Daniels, 805 F.2d at 207.

4. The Court finds that plaintiff cannot establish a prima facie case on his first claim of discriminatory refusal to hire him as Assistant Superintendent of Programs. Plaintiff's resume does not indicate his race and there is no indication that defendants knew plaintiff's race. Even if plaintiff could establish a prima facie case, the Court finds that plaintiff cannot prove that defendant's articulated reason (that the hiring decision was made before plaintiff's resume was received, and therefore was not considered) is a mere pretext. Simply not answering plaintiff's application until approximately one and one-half months after deciding to hire another candidate is not evidence of racial bias. Accordingly, a directed verdict for defendants as to plaintiff's non-hire claim was granted at the close of plaintiff's case.

5. The Court also finds that plaintiff failed to prove his claim of discriminatory termination from his position

as Superintendent at TMHC. Plaintiff must "make out a prima facie case by producing evidence (1) that he belongs to a racial minority, (2) that he was satisfactorily performing his job, (3) that despite this performance he was terminated, and (4) that he was replaced by a non-minority worker." Becton v. Detroit Terminal of Consolidated Freightways, 687 F.2d 140, 141 (6th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). This initial burden of production is "not onerous", Burdine, 450 U.S. at 253. Although the "satisfactory" nature of plaintiff's performance as Superintendent is questionable, the evidence indicates that plaintiff established his prima facie case. However, defendants articulated a legitimate nondiscriminatory reason for plaintiff's termination. Richmond, as appointing authority, lacked trust and confidence in plaintiff's ability to administrate TMHC. As an unclassified employee, plaintiff served at the will of the appointing authority. Plaintiff was unable to persuade the Court either that race more likely motivated defendants or that defendants' reason for termination lacks credence. Thus, plaintiff did not prove mere pretext.

6. Finally, the Court finds that plaintiff likewise did not meet his burden of proving the retaliatory discharge claim. Plaintiff alleged that his termination as Superintendent was in retaliation for filing charges with the OCRC/EEOC over the earlier failure to hire him as Assistant Superintendent of Programs. To prove a prima facie retaliation claim, plaintiff must establish "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the

exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." Wrenn v. Gould, Nos. 85-3285 and 85-3315, slip. op. at 12 (6th Cir. January 9, 1987).

Plaintiff does not meet the fourth prong of the foregoing test. A causal connection is "demonstrated by the proximity of the adverse action to the protected activity." Id. (citing Burrus v. United Telephone Co., 683 F.2d 339, 342 (10th Cir.), cert. denied, 459 U.S. 1071 (1982)). The existence of plaintiff's "failure to hire" discrimination charge was known when plaintiff was hired as Superintendent. This prior knowledge negates the charge of retaliation in discharge. Plaintiff's hiring was in much closer proximity to the filing of the charge than his firing a year later. Based on the evidence, the Court finds no causal connection between plaintiff's protected activity and his discharge.

7. Accordingly, judgment is entered against plaintiff and this cause is dismissed. Costs and fees are not awarded against any party.

IT IS SO ORDERED.

SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio.
February 4, 1987

FILED
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CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS L. WRENN,

Plaintiff,

-vs-

DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO, et al.,

Defendants.

No. C 83-493

MEMORANDUM and ORDER

* * * *

WALINSKI, J.

This cause is before the Court on plaintiff's motion for summary judgment filed February 22, 1985, and the opposition thereto filed April 19, 1985.

By order of February 22, 1985 this Court dismissed certain claims of plaintiff under 42 U.S.C. §1983 and 42 U.S.C. §1985. This matter is complicated by plaintiff's filing on March 13, 1985 a Notice of Appeal on the dismissed claims.

The plaintiff thereafter on December 31, 1985 filed a renewed motion for summary judgment, and on January 27, 1986 a petition for a writ of mandamus seeking to compel a decision on the motion for summary judgment.

Plaintiff completely disregards the Federal Rules of Civil Procedure by filing complaints, motions for summary judgment based on conclusory and self-serving declarations in the complaint, and then mandamus actions to prioritize his cause of action.

APPENDIX I
1 OF 3

It is clear from the motion for summary judgment and the opposition thereto that there are many factual issues that require further proceedings.

By the notice of appeal, jurisdiction in this matter was conferred on the Sixth Circuit Court of Appeals.

Rule 56, Fed. R. Civ. P. directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In ruling on a motion for summary judgment, the Court's function is to determine if any genuine issue exists, not to resolve any factual issues, and to deny summary judgment if such an issue exists. United States v. Diebold, Inc., 369 U.S. 654 (1962); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the Court must construe the evidence in its most favorable light for the party opposing the motion and against the movant." Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). To summarize, if the movant demonstrates that he is entitled to a judgment as a matter of law, then the Court must next weigh the evidence in a light most favorable for the party opposing the motion; if reasonable minds could differ as to a material fact in issue,

then a genuine factual dispute exists and the motion for summary judgment must be denied.

Rule 56(e) places a responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P.

The Court finds that there are factual questions precluding the granting of summary judgment.

Accordingly, the motion of plaintiff for summary judgment is overruled.

IT IS SO ORDERED.

SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio.
February 13, 1986

AO 72A (Rev. 8/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
1987 FEB 20 PM 3:48
U.S. DIST. CT.
NORTHERN DISTRICT
TOLEDO, OHIO

CURTIS L. WRENN,

Plaintiff,

vs.

DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO, et al.,

Defendants.

Case No. C 83-493

OPINION and ORDER

* * * *

WALINSKI, J.

The proceedings in this cause were stayed pending trial in Wrenn v Benson, No. C 81-571, an action involving issues and parties substantially the same as the case sub judice. That trial having been completed November 21, 1986, and judgment having been rendered on February 5, 1987, the stay herein is lifted.

Plaintiff seeks damages for alleged race and age discrimination in connection with his termination as Superintendent of Toledo Mental Health Center ("TMHC") and defendants' later failure to rehire plaintiff as Superintendent upon his reapplication. Originally, plaintiff filed this action under several civil rights and discrimination statutes. However, in its order of February 22, 1985, this Court dismissed plaintiff's 28 U.S.C. §1983 and §1985(3) claims for restrospective relief (including back pay, pain and suffering, economic loss, and punitive damages) against the Ohio Department of Mental Health ("ODMH") and against Donald

APPENDIX J
1 OF 5

O 72A
Rev. 8/82)

Widmann, Timothy Moritz and Myers Kurtz, in their individual and official capacities. (Mem. and Order, February 22, 1985 at 3-5). Further, the Court denied plaintiff's §1983 and §1985(3) claims for preliminary injunctive relief against ODMH in the form of reinstatment and against the individual officials in the form of a gag order to prohibit adverse employment references. (Id. at 8-9), aff'd No. 85-3221, slip op. at 3 (6th Cir. July 21, 1986)). Only three claims remain for decision. Two, involving plaintiff's termination, are for permanent injunctive and declaratory relief, plus costs, for alleged race discrimination in violation of 28 U.S.C. §1983 and §1985(3), and plaintiff's claim under the Age Discrimination in Employment Act, 29 U.S.C.§621 et seq. Also before the Court is plaintiff's claim of disriminatory non-hire arising out of his April 1981 reapplication for the position of Superintendent at TMHC and three other institutions.

In Wrenn v. Benson, this Court found that the reason for plaintiff's termination from employment at TMHC was that Widmann, as appointing authority, lacked trust and confidence in plaintiff's administrative abilities. Wrenn v. Benson, No. C 81-571, slip op. at 4-5, Finding of Fact ¶9 (N.D. Ohio February 5, 1987). Further, this Court ruled that defendants' reason for termination was not a mere pretext. Id. at 7-8, Conclusion of Law ¶5. In light of this Court's findings after trial of Wrenn v. Benson, and for the reasons set forth below, all of plaintiff's remaining claims are dismissed in accordance with the doctrine of collateral estoppel.

O 72A
Rev. 8/82)

Collateral estoppel precludes relitigation of the same issue in a different cause of action between the same parties or their privies. The reason for plaintiff's termination as Superintendent of TMHC is an issue that was finally determined by this Court in the Wrenn v. Benson ruling. This issue cannot be relitigated by plaintiff against Widmann or TMHC, the defendants in Wrenn v. Benson. Nor can it be relitigated against those parties' privies. TMHC is an institution of ODMH, an arm of the State of Ohio, and the two individual defendants in the case sub judice are employees therein. Thus, ODMH, Moritz and Kurtz, as persons or entities having mutual interests and duties derived from a common relationship, are privies to the defendants in Wrenn v. Benson. Accordingly, under the collateral estoppel doctrine, the reason for plaintiffs' discharge as TMHC Superintendent is not an issue that plaintiff can again try against these defendants. Plaintiff's permanant injunctive and declaratory claims under 28 U.S.C. §1983 and §1985(3), being incumbent upon race as the reason for plaintiff's discharge, must therefore, be dismissed.

Similarly, plaintiff's claim of age discrimination under 29 U.S.C.§621 et seg. turns upon whether age was a determining factor in the decision to terminate. Merkel v. Scovill, Inc., 787 F.2d 174, 177 (6th Cir 1986). If plaintiff presents a prima facie case of age discrimination, and defendants articulate a legitimate nondiscriminatory reason for discharge, plaintiff must demonstrate that the proffered reason was pretextual. Ridenour v. Lawson Co., 791 F.2d 52, 56 (6th

Cir. 1986). The Court's factual finding in Wrenn v. Benson of defendants' reason for terminating plaintiff, and the legal finding that the reason was not a mere pretext, collaterally estopps plaintiff's claims that plaintiff was discharged because of his age. Therefore, plaintiff's age claim is dismissed.

Finally, plaintiff alleges disriminatory and retaliatory non-hire upon his April, 1981 reapplication for the position of Superintendent at TMHC and three other ODMH positions. Not hiring plaintiff for these positions because of his earlier discharge is clearly justified, when, as has already been determined after trial in Wrenn v. Benson, the reason for the original disharge was legitimate. A failure to hire discrimination claim requires proof that a plaintiff was qualified for the position. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Daniels v. Board of Education, 805 F.2d 203, 207-8 (6th Cir 1986). The Court finds that prior termination for cause from the same or a similar position within the same department of the state is tantamount to being unqualified for rehire into that position. Thus, plaintiff is unable to establish a prima facie case of discrimination based on non-hire. Plaintiff's discrimination claim for failure to hire must, therefore, be dismissed.

It is, therefore,

ORDERED that this cause is dismissed.

FURTHER ORDERED that costs and fees are not awarded against any party.

SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio.
February 19, 1987

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: , Clerk
of Ohio

By: Deputy Clerk

5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS L. WRENN,

Plaintiff,

-vs-

DEPARTMENT OF MENTAL HEALTH,

Defendant.

No. C 83-493

O R D E R

* * * *

WALINSKI, J.

This cause is before the Court on plaintiff's February 26, 1987 motion to reopen or reconsider this Court's February 20, 1987 decision of dismissal. No opposition was filed.

The Court has reviewed the memorandum and extensive exhibits filed by plaintiff and in light of the reasoning set forth in the order of dismissal, finds plaintiff's motion to be not well taken. Accordingly, it is

ORDERED that plaintiff's motion to reopen or for relief from judgment or for reconsideration is denied.

SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio.
April 6, 1987

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: James S. Gallas
U. S. District Court
Northern Dist. of OH

By: Deputy Clerk

APPENDIX L

SUPREME COURT OF THE UNITED STATES

88-6494 (3) CURTIS L. WRENN
v.
LAWRENCE P. BENSON ET AL.

88-6497 (3) CURTIS L. WRENN
v.
DEPARTMENT OF MENTAL HEALTH OF OHIO

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Nos. 88-6494 AND 88-6497. Decided April 17, 1989

PER CURIAM.

On March 27, 1989, we denied *pro se* petitioner Curtis Wrenn's request to proceed *in forma pauperis* under this Court's Rule 46 in filing petitions for certiorari in *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health*, 489 U. S. ——. Since October Term 1986, petitioner has filed 22 petitions for certiorari with the Court. We denied him leave to proceed *in forma pauperis* with respect to 19 of those petitions, and he paid the docketing fee required by this Court's Rule 45(a) on one occasion.[1] He also filed one petition for

[1] See *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health*, 489 U. S. —— (1989) (IFP status denied); *Wrenn* v. *New York City Health and Hospitals Corp.* and *Wrenn* v. *United States District Court*, 489 U. S. —— (1989) (same); *Wrenn* v. *Thornburgh*, 488 U. S. —— (1989) (same); *Wrenn* v. *Bowen*, 488 U. S. —— (1989) (same); *Wrenn* v. *Commissioner*, 486 U. S. —— (1988) (same); *Wrenn* v. *Gould*, 484 U. S. 1067 (1988) (paid docketing fee required by this Court's Rule 45(a) and submitted petition in compliance with Rule 33); *Wrenn* v. *Gould*, 484 U. S. 961 (1987) (IFP status denied); *Wrenn* v. *Board of Directors, Whitney M. Young, Jr., Health Center, Inc.*, and *Wrenn* v. *Bowen*, 484 U. S. 894 (1987) (same); *Wrenn* v. *Capstone Medical Center*, 483 U. S. 1003 (1987) (same); *Wrenn* v. *Weinberger*, 481 U. S. 1047 (1987) (same); *Wrenn* v. *Christian Hospital NE-NW*, 479 U. S. 1081 (1987) (same); *Wrenn* v. *McFadden*, 479 U. S. 1028 (1987) (same); *Wrenn* v. *Ohio Dept. of Mental Health*, 479 U. S. 1016 (1986) (same), *Wrenn* v. *Ohio Dept. of Mental Health*, 479 U. S. 981 (1986) (same); *Wrenn* v. *Missouri*, 479 U. S. 981 (1986) (same); *Wrenn* v. *Ohio*

rehearing.[2]

This Court's Rule 46.1 requires that "[a] party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave to so proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 . . . setting forth with particularity facts showing that he comes within the statutory requirements." Our decision to deny a petitioner leave to proceed *in forma pauperis* is based on our review of the information contained in the supporting affidavit of indigency.[3] In petitioner's case, a review of the affi-

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Dept. of Mental Health, 479 U. S. 928 (1986) (same); *Wrenn* v. *Ohio Dept. of Mental Health*, 479 U. S. 809 (1986) (same); *Wrenn* v. *St. Charles Hospital*, 477 U. S. 907 (1986); *Wrenn* v. *Walters*, 475 U. S. 1128 (1986).

[2] *Wrenn* v. *Gould*, 485 U. S. —— (1988).

[3] The Clerk of the Court provides the following Form 4 affidavit to those who seek assistance in drafting *in forma pauperis* papers:

"I, [John Doe], being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

"I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

"1. Are you presently employed?

"a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

"b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

"2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

"a. If the answer is yes, describe each source of income and state the amount received from each during the last twelve months.

"3. Do you own any cash or checking or savings account?

"a. If the answer is yes, state the total value of the items owned.

"4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

davits he has filed with his last nine petitions for certiorari indicates that his financial condition has remained substantially unchanged.[4] The Court denied him leave to proceed *in forma pauperis* with respect to each petition. Petitioner has nonetheless continued to file for leave to proceed *in forma pauperis*.

In *In re McDonald*, 489 U. S. ——, —— (1989), we said that "[e]very paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." We do not think that justice is served if the Court continues to process petitioner's requests to proceed *in forma pauperis* when his financial condition has not changed from that reflected in a previous filing in which he was denied leave to proceed *in forma pauperis*.

"a. If the answer is yes, describe the property and state its approximate value.

"3. List the persons who are dependent upon you for support and state your relationship to those persons.

"I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury."

[4] See *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health*, 489 U. S. —— (1989) ($2,309.67 per month in salary; $46 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *United States District Court* and *Wrenn* v. *New York City Health and Hospitals Corp.*, 489 U. S. —— (1989) ($1,390.20 per month in salary; $72 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *Thornburgh*, 488 U. S. —— (1989) ($1,390.20 per month in salary; $72 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *Bowen*, 488 U. S. —— (1989) ($2,309.67 per month in salary; $46 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *Commissioner*, 486 U. S. —— (1988) ($1,073 per month in salary; $14,496 per year in retirement benefits; $42 in cash; $72,000 home; 4 dependents); *Wrenn* v. *Gould*, 484 U. S. 961 (1987) ($1,073 per month in salary; $8,400 per year in retirement benefits; $61 in cash; $72,000 home; 4 dependents); *Wrenn* v. *Bowen*, 484 U. S. 994 (1987) ($1,073 per month in salary; $8,400 per year in retirement benefits; $61 in cash; $72,000 home; 4 dependents).

We direct the Clerk of the Court not to accept any further filings from petitioner in which he seeks leave to proceed *in forma pauperis* under this Court's Rule 46, unless the affidavit submitted with the filing indicates that petitioner's financial condition has substantially changed from that reflected in the affidavits submitted by him in *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health*, 489 U. S. —— (1989).

It is so ordered.

SUPREME COURT OF THE UNITED STATES

88-6494 CURTIS L. WRENN v. LAWRENCE P. BENSON ET AL.

88-6497 CURTIS L. WRENN v. DEPARTMENT OF MENTAL HEALTH OF OHIO

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Nos. 88-6494 AND 88-6497. Decided April 17, 1989

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I dissent from this order for the reasons stated in *In re McDonald*, 489 U. S. ——, —— (BRENNAN, J., dissenting), and in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983) (BRENNAN, J., dissenting).

SUPREME COURT OF THE UNITED STATES

88-6494 CURTIS L. WRENN
v.
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DEPARTMENT OF MENTAL HEALTH OF OHIO

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Nos. 88-6494 AND 88-6497. Decided April 17, 1989

JUSTICE STEVENS, dissenting.

Because I believe the preparation and enforcement of orders of this kind consumes more of the Court's valuable time than is consumed by the routine denial of frivolous motions and petitions, see *In Re Jessie McDonald*, —— U. S. —— (1989) (BRENNAN, J., dissenting); *Brown* v. *Herald Co.*, 464 U. S. 928 (1983) (BRENNAN, J., dissenting); *id.*, at 931 (STEVENS, J., dissenting), I respectfully dissent.